Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SKIDMORE ENERGY, INC.,

Petitioner,

v.

MAGHREB PETROLEUM EXPLORATION, S.A., MEDIHOLDING, S.A., MIDEAST FUND FOR MOROCCO, LTD., SAMAHA TRADING (UK) LTD., ABDU SAOUD, SHEZI NACKVI, and MOHAMMED BENSLIMANE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WAS THE PRE-ANSWER DISMISSAL OF ALL RESPONDENTS (OTHER THAT SAOUD) FOR WANT OF SPECIFIC JURISDICTION ERROR WHERE THE PREDICATE ACTS OCCURRED IN CALIFORNIA?

2. WAS THE PETITIONER DENIED DUE PROCESS BY DENIAL OF ANY U.S. FORUM FOR THE LITIGATION OF ITS DISPUTES WHERE THE NINTH CIRCUIT RULED THAT NO SPECIFIC JURISDICTION EXISTED IN CALIFORNIA BECAUSE THE NINTH CIRCUIT REQUIRED THAT THE ACTION BE BROUGHT IN THE DISTRICT IN WHICH THE DAMAGES FLOWED (IN TEXAS) AND WHERE THE FIFTH CIRCUIT RULED THAT NO SPECIFIC JURISDICTION EXISTED IN TEXAS ARISING OUT OF THE VERY SAME TRANSACTIONS BECAUSE THE FIFTH CIRCUIT REQUIRED THAT THE ACTION BE BROUGHT IN THE DISTRICT IN WHICH THE PREDICATE ACTS OCCURRED (IN CALIFORNIA)?

3. WAS THE PRE-ANSWER DISMISSAL OF RESPONDENT SAOUD UPON LIMITATIONS ERROR WHERE PETITIONER PLEADED AND ALLEGED WITHIN THE FOUR CORNERS OF THE COMPLAINT FACTS IN SUPPORT OF THE DISCOVERY RULE AND WHERE THE

SOLE BASIS FOR THE AFFIRMATION OF DISMISSAL BY THE COURT OF APPEALS WAS A SINGLE LETTER FROM A NON-PARTY STRANGER TO THE TRANSACTION THAT IT WOULD NOT BE RESPONSIBLE FOR THE EXPENSES IN THE TRANSACTION MADE THE BASIS OF SUIT IN THE TRIAL COURT?

LIST OF PARTIES

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner, Skidmore Energy, Inc., is a privately owned entity. This entity has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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The ruling of the United States Court of Appeals for the Ninth Circuit, dated July 16, 2009, affirming in all respects the decision of the District Court, is unreported, and is reproduced at Appendix A. Petitioner's timely Petitions for Rehearing and Rehearing En Banc were denied on September 23, 2009, and is reproduced at Appendix C. The decision of the District Court is reproduced at Appendix B.

STATEMENT OF JURISDICTION

The Order of the United States Circuit Court of Appeals for the Ninth Circuit sought to be reviewed was entered on July 16, 2009. Petitioner timely filed a Petition for Court below Rehearing and a Petition for En Banc Rehearing on July 28, 2009. The Petitions for Rehearing were denied on September 23, 2009. This Petition is timely under 28 U.S.C. §2101 and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the entry of the denial of the Petitions for Rehearing, as reflected in the Affidavits of Mailing which were filed in response to the Court Clerk's rejection of Petitioner's

December 17, 2009 Petition as untimely, and which are again filed concurrently herewith. This Court has jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit pursuant to the jurisdiction conferred by 28 U.S.C. §1254.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1332 (diversity).

The Court of Appeals affirmed the Trial Court's pre-answer dismissal of all Respondents (except Saoud, a California resident) upon a finding of a lack of specific jurisdiction despite the allegations within the four corners of the Complaint that Petitioner's causes of action against the Respondents arose out of misrepresentations and omissions made during a business meeting held within the State of California. The Court of Appeals affirmed the Trial Court's pre-answer dismissal of Respondent Saoud upon his claim of limitations. The Saoud motion to dismiss was granted despite Petitioner's allegation of and reliance upon the

discovery rule within the four corners of the Complaint and despite the fact that the sole basis for the affirmation of dismissal was the Court of Appeals' reliance upon a single letter sent by a non-party stranger to the transaction (Dallah Al Baraka Group) that it would not be paying any of the drilling expenses in the transaction made the basis of suit in the Trial Court.

These holdings are contrary to well settled precedent of this Court relating to jurisdiction, including Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1984); Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed.2d 804 (1984); see also, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

These holdings are also directly contrary to holding of the Fifth Circuit Court of Appeals relating to jurisdiction, including McFadin v. Gerber, ___ F.3d ___, 2009 WL 3722729 (5th Cir. 2009); Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006).

The holding affirming the pre-answer dismissal of Saoud on limitations is also contrary to well settled precedent law relating to the granting of a pre-answer motion to dismiss on limitations where the Complaint relies upon and alleges facts supporting the application of the discovery rule. The discovery rule on a fraud claim involves inherent issues of fact and may be decided as a matter of law only when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1309 (9th Cir. 1982); Robuck v. Dean Witter & Co., Inc., 649 F.2d 641, 644 (9th Cir. 1980); Hilton v. Mumaw, 522 F.2d 588, 602 (9th Cir. 1975). Kramas v. Security Gas & Oil Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 103 S.Ct. 444 (1982).

REASONS FOR GRANTING THE WRIT

I. SPECIFIC JURISDICTION.

The Ninth Circuit's decision effectively denies Petitioner jurisdiction to bring its claims anywhere within the United States despite the uncontroverted

fact that the predicate acts and the damages upon which the claims were based occurred within the United States. The existence of a forum for the resolution of claims made against foreign persons and entities who commit predicate acts within the United States and for which damages are foreseeable within the United States is critical for the protection of American interests in multi-national transactions.

These holdings are also directly contrary to well settled precedent of this Court relating to jurisdiction, including Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1984); Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed.2d 804 (1984); see also, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

These holdings are also directly contrary to holding of the Fifth Circuit Court of Appeals relating to jurisdiction, including McFadin v. Gerber, ___ F.3d ___, 2009 WL 3722729 (5th Cir. 2009); Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006). The issue of in personam specific jurisdiction

is important to the jurisprudence of U.S. Courts. The disagreement between the Circuits should be resolved.

II. LIMITATIONS AND THE DISCOVERY RULE.

The Ninth Circuit's decision also effectively denies Petitioner the right to a determination of substantial issues of fact where Respondent Saoud was dismissed upon a pre-answer plea of limitations despite Petitioner's pleading and specific allegations, within the four corners of the Complaint, in support of the discovery rule. The discovery rule on a fraud claim involves inherent issues of fact and may be decided as a matter of law only when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1309 (9th Cir. 1982); Robuck v. Dean Witter & Co., Inc., 649 F.2d 641, 644 (9th Cir.1980); Hilton v. Mumaw, 522 F.2d 588, 602 (9th Cir. 1975). Kramas v. Security Gas & Oil Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 103 S.Ct. 444 (1982). Even under a summary judgment

standard, which requires not only a well pleaded complaint, but also evidence by the Plaintiff in support of the discovery rule, discovery of fraud is generally and issue of fact for the jury, precluding dismissal as a matter of law. General Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991); Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir.1988). The ability of citizens to bring claims against foreign persons and entities who commit fraud within the United States but which fraud is inherently undiscoverable until the defendant has consummated the fraud and the citizen has suffered the damages caused by the fraud is also critical for the protection of American interests in multi-national transactions and should be resolved by this Court.

III. COMMON LAW FEDERAL JURISDICTION

Respondents asserted, and the Ninth Circuit held, that no jurisdiction existed over Respondents anywhere within the United States despite the uncontroverted fact that predicate acts and the damages upon which the claims were based occurred

within the United States. However, the United States Supreme Court has held that common law jurisdiction exists, even over foreign acts, if that conduct "was meant to produce and did in fact produce some substantial effect in the United States". Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (jurisdiction over Sherman Act claims brought against foreign defendants for a conspiracy that occurred abroad to raise reinsurance prices); see also, United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997); Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir.2002) (applying substantial effects test to foreign securities fraud). The Hartford Fire Court also held that comity considerations, such as whether relief ordered by an American court would conflict with foreign law, were properly understood not as questions of whether a United States Court possessed subject matter jurisdiction, but instead as issues of whether such a court should decline to exercise the jurisdiction that it possessed. See, Id. at 797-98 & n. 24, 113 S.Ct. 2891.

IV. SPECIFIC JURISDICTION FACTUAL ANALYSIS:

Petitioner asserted specific jurisdiction over Respondents. When ruling on a motion to dismiss, the Court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. The Court must accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.

A. Facts Applicable to All Defendants.

The facts and details of the business transactions between the parties and the acts in furtherance of the conspiracy to defraud are set forth in the First Amended Complaint ("FAC"). [FAC ¶¶ 20 - 45, 54, ER 340-348, 350-353]. Briefly summarized, the FAC alleges as follows with respect to the Defendants.

Petitioner sought to explore for oil and gas in Morocco, and in fact found vast reserves of oil and gas. Petitioner was induced by Respondents to take on a "local" Moroccan partner/ shareholder,

Mediholding. Respondents insisted that all oil exploration needed to be conducted by a Moroccan Company, with Mediholding to be responsible for handling all local issues, including legal and accounting compliance. Petitioner created and originally owned 90% of the outstanding shares in Lone Star, the Moroccan company. Saoud, Alaoui and Mediholding represented that 10% of the shares were required to be owned and held by them.

Prior to the discovery of oil and gas, Petitioner provided all of the funding for the exploration and drilling of the first well. Following discovery of the oil and gas, Respondents represented that significant funding for the payment of Lone Star's drilling creditors would be contributed by a Moroccan owned investor to be chosen by Respondents in exchange for the transfer of a portion of Petitioner's stock ownership in Lone Star. In reliance on the agreements reached, Petitioner transferred ½ of its stock in Lone Star to MFM and Nackvi was made a member of Lone Star's Board of Directors as MFM's

representative. Thereafter, Lone Star's drilling activities were increased.

Petitioner later learned that MFM was not paying Lone Star's creditors and that Mediholding was not ensuring Lone Star's operation in conformity with Moroccan law. By the first of February 2001, drilling operations in Morocco had been shut down due to nonpayment by MFM of its share of expenses, despite repeated promises by Respondents that sums due under the drilling contracts would be brought current.

At Benslimane's request, Benslimane and Nackvi came to California to meet with Petitioner's representative, John Paul DeJoria. Nackvi introduced himself as a director of Samaha, the agent of MFM. He further disclosed that MFM was owned by Saudi Prince Bandar bin Sultan and Saudi Sheik Saleh Abdullah Kamel (Samaha's owner). At that meeting, Nackvi represented that Samaha would promptly pay Lone Star's outstanding bills and get its drilling program recommenced. Nackvi later repeated this promise in a telephone call he

made to Mr. DeJoria in California. In reliance upon these promises made by Respondents, Mr. Gustin stepped down as Chairman and CEO of Lone Star and was replaced by Nackvi. Respondents installed Richard Menkin, also a director of Samaha, as Lone Star's controller. Benslimane continued to handle the functions of co-managing director.

Without Petitioner's knowledge, Respondents then proceeded to systematically cut Petitioner out of its valuable oil and gas interests. Without notice to Petitioner, Respondents appointed Menkin a director of Lone Star, and Petitioner's shareholders were removed from Lone Star's Board. Respondents then purported to dilute Petitioner's 44% ownership of Lone Star down to 0.27% through the issuance of 1,500,000 new shares without fair consideration, with MFM owning 99.65% of the shares. All of this occurred without Petitioner's prior knowledge or consent. Subsequently, Lone Star was renamed Maghreb Petroleum Exploration, S.A. ("MPE") and Nackvi was replaced by Samaha's Director Menkin as MPE's CEO/President.

B. This Case Arises out of Tortious Conduct That Occurred in California

Contrary to the District Court's conclusion, this case does not involve a foreign defendant with conduct in a foreign jurisdiction that Petitioner must somehow show has a significant effect upon a California resident. This case involves tortious conduct, more properly analogous to an automobile accident between two nonresidents occurring on a California Highway. One could not seriously argue that California would not have jurisdiction over a case arising out of a foreigner's tortious conduct causing that California accident.

Likewise, in this case, jurisdiction is proper because the tort claims arise out of the purposeful contacts and tortious acts committed by the Respondents while physically present within the State of California that created the required "substantial connection" with the State of California. Respondents traveled to California to meet with Petitioner and to negotiate a business transaction, and during that negotiation, misrepresented and

omitted facts upon which the Petitioner reasonably relied to its detriment, giving rise to the causes of action asserted against the Respondents in this action. Tortious acts were committed by Respondents' representatives while physically within California, and the Petitioner reasonably relied upon, and was the victim of, that tortious conduct while also physically within California.

Although the burden of proof was on the Petitioner to show that jurisdiction was appropriate, in the absence of an evidentiary hearing, the Plaintiff need only make a prima facie showing of jurisdictional facts. Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990); Data Disc, Inc. v. Systems Tech. Assoc., 557 F.2d 1280, 1286 (9th Cir. 1977). ("it is necessary only for these materials to demonstrate facts [that] support a finding of jurisdiction in order to avoid a motion to dismiss.").

Petitioner clearly made at least a prima facie showing of jurisdiction in the District Court, showing that jurisdiction was proper because the tort claims arose out of the Respondents' purposeful contacts

and tortious acts of the Respondents committed while physically present within the State of California against a plaintiff who was also physically in California. Respondents' Motions to Dismiss for want of jurisdiction should therefore have been denied. Compare, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1984); Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed.2d 804 (1984); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004); Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082 (9th Cir. 2000); Panavision International, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).

In this case, Petitioner clearly pleaded, and therefore established for the purpose of the pre-answer motions to dismiss, "specific jurisdiction". The nonresident corporate Respondents, by and through their officers, directors and/or corporate representatives, Benslimane and Nackvi, committed acts and consummated transactions within California, purposefully availing themselves of the

privilege of conducting activities in California, thereby invoking the benefits and protections of its laws. [FAC ¶¶35-42,54, ER 345-347,350-353]. Even the Respondents admitted the contacts with California alleged by Petitioner. [Nackvi Dec. ¶13, ER298; Benslimane Dec. ¶12, ER 122; Menkin/ Samaha Dec. ¶¶11,12, ER 96]. Petitioner's claims in the District Court arose directly out of and resulted directly from the Respondents' forum-related activities. The exercise of jurisdiction was therefore both reasonable and permissible. Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988).

Under Respondents' theory of jurisdiction, this case "falls between the cracks", there being no jurisdiction within the United States that could hear the case. There is no doubt that Petitioner properly pleaded and submitted prima facie evidence that the corporate Respondents and their agents, Nackvi and Benslimane, engaged in misrepresentations and omissions within the United States and specifically, within the State of California. There is also no doubt that Petitioner pleaded in the Texas case that

Petitioner suffered damages as a result of such Respondents' tortious conduct within the United States and specifically, within the State of Texas.[1] The argument of all Respondents was that Petitioner cannot assert its claims against them in Texas, because the 5th Circuit requires that the action be brought in the district in which the actionable conduct occurred (in California), and that Petitioner cannot assert its claims against them in California, because the 9th Circuit requires that the action be brought in the district in which the damages flowed (in Texas). This conflict of laws Catch-22 wrongfully denied Petitioner justice in any U.S. court.

C. **Jurisdiction Exists, over Foreign Defendants Because Their Acts "Were Meant to Produce and did in Fact Produce Some Substantial Effect in the United States".**

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[1] 12/28/2004 Northern District of Texas Memorandum Order Granting Motions to Dismiss of all seven Respondents herein, at Pages 1,3 [Saoud Request for Judicial Notice, Exh. "B", ER5; 322-327]. ("...the Court concludes that he Plaintiffs have failed to allege facts demonstrating that MPE, MFM, Samaha, Dallah or Mediholding, all non-resident defendants, had purposeful contacts with Texas that would give rise to specific jurisdiction in this Court.".) (2004 WL 2804888, at *6, not reported).

The conflict in the law asserted by Respondents would prevent Petitioner from asserting any claims against any of the Respondents anywhere within the United States despite the uncontradicted fact that both the actionable conduct occurred, and the damages accrued to Petitioner, within the United States. The United States Supreme Court has held that common law jurisdiction exists, even over foreign acts, if that conduct "was meant to produce and did in fact produce some substantial effect in the United States" . Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (jurisdiction over Sherman Act claims brought against foreign defendants for a conspiracy that occurred abroad to raise reinsurance prices); see also, United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir.1997); Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir.2002) (applying substantial effects test to foreign securities fraud). The Hartford Fire Court also held that comity considerations, such as whether relief ordered by an American court would conflict with foreign law, were properly understood

not as questions of whether a United States Court possessed subject matter jurisdiction, but instead as issues of whether such a court should decline to exercise the jurisdiction that it possessed. See, Id. at 797-98 & n. 24, 113 S.Ct. 2891.

Likewise, the Due Process Clause of the Fourteenth Amendment establishes the limit of in personam jurisdiction over a nonresident defendant. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415, 104 S.Ct. 1868, 1872 (1984); Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878). Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " Helicopteros Nacionales, 466 U.S. at 415, 104 S.Ct. at 1872; International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting, Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). When a controversy is related to or "arises

out of" a defendant's contacts with the forum, the United States Supreme Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. Helicopteros Nacionales, 466 U.S. at 415, 104 S.Ct. at 1872; Shaffer v. Heitner, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977). When personal jurisdiction is asserted over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant Helicopteros Nacionales, 466 U.S. at 415, 104 S.Ct. at 1872. To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. International Shoe, 326 U.S. at 319.

Respondents cited in the Court below "general jurisdiction" cases despite the fact that in this case, Petitioner clearly sought to enforce "specific jurisdiction" over the Respondents. Respondents ignored caselaw holding that "specific jurisdiction" was proper and ignored that Petitioner pleaded predicate acts undeniably committed in California. Respondents cited Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004); Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082 (9th Cir.2000); Sinatra v. National Enquirer, Inc., 854 F.2d 1191, (9th Cir. 1988). A close review of the cases cited by Respondents discloses the inapplicability of those cases to the jurisdictional issues in this case. The Schwarzenegger case involved a claim of "general" jurisdiction, not the lower standard for "specific jurisdiction":

> **Schwarzenegger argues, quite implausibly, that California has general personal jurisdiction over Fred Martin. ... [Defendant's] contacts fall well short of the "continuous and systematic" contacts that the Supreme Court and this court have held to constitute sufficient "presence" to warrant general jurisdiction.** ... Alternatively, Schwarzenegger argues that Fred Martin has

> sufficient "minimum contacts" with California arising from, or related to, its actions in creating and distributing the Advertisement such that the forum may assert specific personal jurisdiction. ... [However,] Schwarzenegger does not point to any conduct by Fred Martin in California. Id., at 502-5.

It is clear that the Ninth Circuit would have sustained specific jurisdiction even in the absence of general jurisdiction if the tortious acts giving rise to the claims had occurred in California. Id.

Likewise, Bancroft was decided on "general jurisdiction" grounds:

> **The district court granted ANI's motion to dismiss for lack of personal jurisdiction, reasoning that the continuous and systematic contacts in California necessary for general jurisdiction were lacking and that B & M had not satisfied the criteria for specific jurisdiction.** ... The district court correctly found general jurisdiction lacking in this case, because ANI's contacts do not qualify as either substantial or continuous and systematic. Id., at 1086-87.

The Bancroft Court went on to hold that the defendant in that case had not committed any tortious acts within the forum state, and that the

there was no evidence that the defendant engaged in wrongful conduct targeted at a plaintiff whom the defendant knew to be a resident of the forum state. Id. at 1086-87.

Finally, Sinatra, clearly supports specific jurisdiction over Respondents in the District Court:

> Sinatra does not contend, and it is clear, that the Clinic did not have "substantial" or "continuous and systematic" contacts with California to support the exercise of general jurisdiction. ... Therefore, the issue before this court is whether the district court properly asserted "limited" or "specific" jurisdiction for a cause of action arising out of the Clinic's forum-related activities. ... In this case, the Clinic has directed its activities at California by using Sinatra's name in an effort to promote its business. The Swiss acts or directions that had a California effect consist of: (1) the misappropriation of the value of Sinatra's name through interviews conducted in Switzerland between Clinic employees and Enquirer reporters, in which the Clinic supplied false information about patients; and (3) the Clinic's knowledge of Sinatra's residence in California. In addition, California is the situs of Sinatra's injury. Id., at 1195.

It is important to note that in Sinatra, none of the

tortious conduct was alleged to have occurred in California, and yet, the California Court had "specific jurisdiction" over the defendant because the defendant purposefully availed itself of the benefits of doing business in California. In this case, the facts supporting specific jurisdiction are even stronger. Respondents purposefully committed the tortious acts and omissions within the State of California out of which Petitioner's claims arose.

Respondents admit that the Ninth Circuit applies a three-part test to evaluate whether a court may exercise specific jurisdiction:

> 1. The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> 2. The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> 3. Exercise of jurisdiction must be reasonable.

Schwarzenegger, 374 F.3d at 802; Bancroft, 233 F.2d

at 1088; Sinatra, 854 F.2d at 1195. Under the three-part test, the plaintiff must show that the defendant's contacts with California have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Asahi Metal Industries v. Superior Court of Solano County, 480 U.S. 102, 107 S.Ct. 1026, 1030-31 94 L.Ed.2d 92 (1987); (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985)). To satisfy the minimum contacts requirement, the court examines whether the defendant acted affirmatively to promote or transact business in California. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 839-41 (9th Cir. 1986). A lesser showing of minimum contacts may still warrant the exercise of jurisdiction upon a showing of reasonableness. Burger King, 471 U.S. at 477, 105 S.Ct. at 2184. **Once minimum contacts is shown, a rebuttable presumption arises that the exercise of jurisdiction is reasonable.** Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th

Cir. 1986). The defendant bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable. Burger King, 471 U.S. at 477-78, 105 S.Ct. at 2184-85; Haisten, 784 F.2d at 1397. Purposeful availment analysis examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff. Asahi, 480 U.S. at 107; Decker, 805 F.2d at 840.

In this case, the District Court, in its Order Granting Respondents' Motions to Dismiss [ER 220], recognized that jurisdiction in this case was sounded, in part, upon torts committed in California.[2] The District Court then, however, relied upon contract jurisdiction cases to grant Respondents' motions to dismiss for want of jurisdiction. The District Court specifically cited Roth v. Garcia Marquesz, 942 F.2d 617 (9th Cir. 1991), and Doe I v. Unocal, 248 F.3d

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[2] In the instant case, the causes of action asserted against Mediholding and MPE sound in both tort and contract; the claims against Benslimane sound in tort only. [Order Granting MPE, Benlimane and Mediholding Motions to Dismiss, ER10]; see also, Order Granting MFM Motion to Dismiss, ER 129 Order Granting Respondents'[Nackvi and Samaha] Motions to Dismiss, ER212-213].

915, (9th Cir. 2001) to support its dismissal for want of personal jurisdiction. [Order Granting MPE, Benlimane and Mediholding Motions to Dismiss, ER13; Order Granting MFM Motion to Dismiss, [ER135]. Roth provided:

> Roth filed a complaint in district court seeking declaratory relief to determine the status of his rights to produce the film. Appellees filed a motion to dismiss, alleging both that the court lacked personal jurisdiction over each defendant and that ... appellees had not entered into a binding contract ... Roth, at 620. (emphasis added).
>
> It is important to distinguish contract from tort actions. For example, ... the Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum state. Id., at 621 (internal citations omitted).
>
> We have explained that "the purposeful availment analysis turns upon whether the defendant's contacts are attributable to 'actions by the defendant himself,' or conversely to the unilateral activity of another party." Id., at 621, (internal citations omitted).

Unocal provided:

> Total's contractual relations with Unocal do not constitute purposeful availment of the benefits and protections of California law. Unocal, at 924.
>
> ***
>
> To determine whether a claim arises out of forum-related activities, courts apply a "but for" test. Id., at 924, (citing Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995) ("but for [Defendant's] contacts with the United States and California, would [Plaintiff's] claims against [Defendant] have arisen?")
>
> ***
>
> Plaintiff's evidence is insufficient to establish either purposeful availment of a but-for relationship between Total or its subsidiaries' contractual relations with Unocal in the forum and plaintiffs' claims. Id., at 925. (emphasis added).

The Court below necessarily concluded that the Respondents' California misrepresentations and omissions could not survive the Unocal "but for" test. The District Court erred in applying contract law to a tort claim. The District Court denied jurisdiction despite allegations in the FAC that Respondents' California misrepresentations and omissions, upon which Petitioner reasonably relied, were not "merely

incidental" [3], but rather:

1. directly caused Petitioner to agree that its representative, Mr. Gustin, would step down as Lone Star's Chairman, President and CEO;

2. allowed Respondents total operating control of Lone Star;

3. gave Respondents the ability to remove Petitioner's representatives from Lone Star's Board of Directors; and

4. in turn, allowed Respondents, without Petitioner's knowledge or consent, to vote to dilute Petitioner's ownership interest in Lone Star from 44% to 0.27%.

[FAC ¶¶36-42; 54, ER345-347; Gustin Dec., ER 20-25]. But for the fraud of Respondents, Petitioner's representatives would have remained on Lone Star's

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[3] "The Court agrees with Mediholding and MPE that the April 26, 2001 meeting between Nackvi, Benslimane and DeJoria was merely "incidental" to the parties' overall contractual relationship. [Order Granting MPE, Benlimane and Mediholding Motions to Dismiss, P. 12, ER 16]; and

"The Court agrees with MFM that the April 26, 2001 meeting between Nackvi and DeJoria was merely "incidental" to the parties' overall contractual relationship. [Order Granting MFM Motion to Dismiss, P. 12, ER 135];

Board of Directors and their substantial ownership interest could not have been fraudulently diluted. The Courts below thus ignored Petitioner's allegations in the FAC that Respondents "did some act or consummated some transaction" within the forum state, upon which specific jurisdiction was based. Petitioner alleged that each Respondent, individually and acting through designated representatives, while physically present in California with Petitioner's representative, committed fraud in California by misrepresenting and omitting material facts upon which Petitioner reasonably relied. These misrepresentations and omissions form the basis for the Petitioner's tort claims against all Respondents. Jurisdiction is proper where the causes of action arise from actions by the Respondents themselves that created a "substantial connection" with the forum State. So long as it creates a "substantial connection" with the forum, even a single tortious act can support jurisdiction. Id., at Burger King 471 U.S. at 2184, fn. 18.

D. The District Court Had Personal Jurisdiction over Respondents Under the Ninth Circuit's Three Part Test for Specific Jurisdiction.

Part 1: **Each of the Respondents Performed Acts or Consummated a Transaction Within California by Which They Purposely Availed Themselves of the Privilege of Conducting Activities in California, Thereby Invoking the Benefits and Protections of its Laws.**

The District Court sustained personal jurisdiction over Respondent Saoud, a California resident. The remaining Respondents, Nackvi, Benslimane, MPE, MFM, Mediholding and Samaha met with Petitioner's representative in California, made misrepresentations of fact to induce the transactions in California, and admitted telephone calls and faxes made to Petitioner's representative in California. Petitioner pleaded in the FAC that these communications in California were fraudulent. [FAC ¶¶ 36-42, 54, ER 345-347, 350-354]. As set forth hereinabove, the Respondents voluntarily traveled to California to negotiate a business transaction, and during that negotiation, misrepresented and omitted

facts upon which the Petitioner reasonably relied, giving rise to Petitioner's causes of action in this case. Respondents clearly availed themselves of the privilege of conducting business activities in California, thereby invoking the benefits and protections of its laws.

Part 2: **The Claims Against Each of the Respondents Arose out of or Resulted From, the Respondents' Forum-related Activities.**

Most assuredly, the misrepresentations by Respondents, made in California, that they would ensure that Lone Star's creditors were promptly paid and drilling would recommence, were crucial predicate acts and integral parts of the conspiracy to (1) shut drilling down and to keep it shut down so that (2) Respondents could obtain the controlling interest over Lone Star (the Moroccan business entity) and dilute Petitioner's ownership and control of Lone Star from 44% to 0.27%. Petitioner submitted prima facie evidence that it reasonably relied to its detriment on the false statements made in California by Respondents and the agreement

reached in California to pay Lone Star's creditors so that the drilling program could be recommenced. [see, FAC ¶¶36-42, 54, ER 345-347, 350-353]. All of Petitioners damages arose from this nucleus of operative fact.

Part 3: The Exercise of Jurisdiction over Respondents was Reasonable.

Respondents requested, and voluntarily traveled to, and met with, Petitioner in California, directed communications to Petitioner in California, therefore affirmatively invoking the rights and protections of the laws of California. Respondents negotiated an agreement with Petitioner in California, and falsely represented facts upon which Petitioner reasonably relied in California. Respondents thereby invoked the California's jurisdiction over the transactions, and the torts and contract claims arising therefrom. Because Respondents came into California, and committed torts in California, both individually and corporately, the exercise of jurisdiction over Respondents in the District Court was clearly reasonable. Even though

the Respondents alleged that the number of contacts with California was small, jurisdiction was proper because the causes of action arose from the actions by the Respondents themselves that created a "substantial connection" with California upon which jurisdiction is properly based. As set forth in Burger King, even a single act can support jurisdiction. Committing a fraud within California is analogous to causing an automobile accident in California. The District Court clearly had jurisdiction over Respondents in a case arising out of Respondents' tortious conduct committed at least in part in California. The District Court erred in dismissing Petitioner's claims against Respondents for want of jurisdiction. Burger King, 471 U.S. at 476; Helicopteros, 466 U.S. at 415; International Shoe, 326 U.S. at 316; Sinatra, 854 F.2d at 1195.

E. Respondents Cannot Avoid Jurisdiction by Attempting to Controvert Petitioner's Allegations.

Each of the Respondents submitted declarations in support of their respective motions to dismiss for want of jurisdiction that attempted to

controvert the allegations of Plaintiff's First Amended Complaint. (see, Nackvi Dec. at ¶13, ER 298-299; Benslimane Dec. at ¶12, ER 122-123; Menkin/MPE Dec. at ¶11, ER 96; Alaoui/ Mediholding Dec. at ¶11, ER 110; Prast/MFM Dec. at ¶13, ER 192; Nackvi/Samaha Dec. at ¶11, ER 312).

The Courts below ignored the allegations within the FAC about Respondents' representatives, Benslimane, Nackvi and Menkin, and their contacts. The Courts below instead accepted as true, and relied upon in granting the motions to dismiss, Respondents' self-serving declarations that Respondents did not have any contacts with the State of California concerning the matters that are subject of this case, and that representatives of the Respondents never had any substantial meetings in the State of California with the Petitioner in this case (see, e.g., MPE Dec. ¶12, ¶ 13, ER 96). This the Court could not do.

These arguments ignore the legal standard governing motions to dismiss for lack of personal jurisdiction. To defeat the motion to dismiss, Petitioner "need only make a prima facie showing of

jurisdiction." Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 862 (9th Cir. 2003). Accord, Harris Rutsky & Co. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003). Petitioner "need only demonstrate facts that, if true, would support jurisdiction over the Respondents." Mattel, 254 F.3d at 862. Plaintiff's "version of the facts is taken as true, and any conflicts between the facts contained in declarations submitted by the two sides must be resolved in [Plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." Mattel, 354 F.3d at 862; Accord, Harris Rutsky, 328 F.3d at 1129.

In this case, the FAC alleged repeated contacts, misrepresentations and omissions made in California to Petitioner by Respondents, acting individually and as representatives of the corporate Respondents. ER 345-346 (FAC ¶¶ 36 [meeting in Los Angeles], 37 [phone call to Los Angeles], 38 [fax from Los Angeles to Alaoui], 39 [facsimile to Los Angeles]). The FAC alleged that all of these business communications were the direct result of business matters discussed in California at the meeting called

by Respondents' representative, Benslimane. These contacts, as pleaded, evidence the commission of an intentional tort against Petitioner in California. Petitioner's allegations in its FAC were also supported by the Declarations of Michael Gustin, submitted in opposition to Respondents' motion to dismiss. (see, 11/7/2005 Gustin Dec. at ¶¶ 5, 9, 10, ER 231,232,233, 234; 9/29/2006 Gustin Dec. at ¶¶4,9, 10; ER 138,140,141. 8/6/2007 Gustin Dec. at ¶¶7, 12, 13; Exs. 8-13, ER 20, 23,24. Clearly, the issue of credibility of witnesses is reserved for the trier of fact.

The Court below, in its Opinion (Attachment 1), held "specific jurisdiction" did not exist in this case with respect to all Appellees except California resident Saoud.

The Court below acknowledged that the Ninth Circuit test for in personam jurisdiction is coexistent with, and as broad as, that allowed under the Fourteenth Amendment to the United States Constitution. (Opinion, at P.2). The Court below also acknowledged that Petitioner alleged, within the four corners of Petitioner's First Amended Complaint,

that Respondents made material misrepresentations in a California meeting called by Respondents, upon which Petitioner relied to its detriment. (Opinion, at P.3). However, the Court below held that Petitioner's First Amended Complaint demonstrated that Petitioner could not have justifiably relied upon Respondents' false California representations because such false representations were repudiated by Appellees. (Opinion, at P.3).

Although the Court below did not make any record citation for this holding, there was only one section of the First Amended Complaint and one Exhibit that even arguably related to any statement in the record upon which the Court below could have relied for its holding that repudiation barred justifiable reliance.

The Court below relied upon the contents of a letter dated May 17, 2001 (E.R. 111) for the proposition that Appellees' repudiated any false representations made at the California meeting. However, a close reading of the Letter shows that it cannot support such a conclusion.

The referenced letter was from Richard

Menkin, on behalf of only the Dallah Al Baraka Group (a non-party) stating that non-party Dallah Al Baraka Group would not be paying the outstanding bills for Lone Star Energy (the Moroccan operating entity). (E.R. 111). The letter referenced only non-party, Dallah Al Baraka Group, and did not state or infer that any other party, including any of the Respondents would not be paying the outstanding bills of the operating entity as alleged by Petitioner in the First Amended Complaint. (E.R. 111). None of the Respondents ever notified Petitioner that any of the Respondents would not be paying the outstanding bills of the operating entity as represented and agreed during the California meeting, and as alleged in the First Amended Complaint, and upon which Petitioner relied in making its claim of specific jurisdiction.

A prima facie showing of specific jurisdiction was clearly made under the allegations of the First Amended Complaint. The Court below erred in holding that it did not under the allegations within the four corners of the Complaint.

V. DISMISSAL OF SAOUD ON LIMITATIONS

The Court below also held that dismissal of Respondent Saoud upon limitations on the fraud/conspiracy claim was appropriate because Saoud had not personally committed any fraudulent acts after introducing the parties in 1999. (Opinion, P. 3). However, Petitioner alleged in the First Amended Complaint that Saoud and the remaining Respondents engaged in an ongoing conspiracy that began in 1999 when Saoud insisted that (a) Mediholding be brought in as Petitioner's local partner and (b) Lone Star (a Moroccan corporation) be formed for Petitioner's Moroccan oil exploration venture, and culminated in October, 2001, when the Respondents completed the fraud by diluting Petitioner's ownership interest in Lone Star from 44% down to 0.27%. The Court below cannot simply ignore these allegations by finding that Appellees committed several breaches of contract prior to 2001, particularly where these simple breaches of contract were not alleged to have constituted fraud.

Conspiracies, by definition, have multiple participants who perform various wrongful acts in

furtherance during the course of the conspiracy. The conspirator who commits the first act is just as liable for the injury/damages as the conspirator who commits the final act. A party who joins in a conspiracy is jointly and severally liable "for all acts done by any of the conspirators in furtherance of the unlawful combination." Bentley v. Bunton, 94 S.W.3d 561, 619, (Tex. 2002); Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 926 (Tex. 1979); Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983); see also, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 212 (9th Cir.1964); cert. denied, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964) (now, for economic damages). Thus, tort liability extends to all conspirators, even those who may have merely planned, assisted, or encouraged the wrongdoer's acts. Id.

The transactions alleged by Petitioner showed that Petitioner had not been injured, and certainly neither knew nor should have known of any fraud or breach of fiduciary duty (as opposed to a mere breach of contract) by any involuntary dilution prior to the date of such dilution. Therefore, Petitioner's

fraud/conspiracy cause of action could not have accrued before, at the earliest, July 31, 2001 or October 31, 2001, the dates that the vote to authorize additional shares and the actual issuance of 1.5 Million additional shares to MFM occurred. Both such dates are within the statute of limitations. Petitioner would have had to have been clairvoyant to have known or even reasonably suspected future wrongful conduct months before that conduct occurred.

Even without the discovery rule, Petitioner's fraud/conspiracy claim was timely because brought within 4 years of the acts causing the first injury. As alleged in the First Amended Complaint, the injury occurred in October of 2001 when Petitioner's stock ownership was watered down from 44% to 0.27%. Both this Court and the trial court assumed the applicability the Texas 4 year fraud and breach of fiduciary duty statute of limitations in their decisions. This Court cannot ignore the clear, direct and unequivocal allegations in the First Amended Complaint, instead making a contrary finding that Petitioner had been injured by some prior mere

breach of contract and that therefore a fraud or breach of fiduciary duty which occurred months or years later is also barred.

The Court below, like the District Court has held that Petitioner should have discovered that it would be defrauded by May, 2001, months before the challenged board meeting and dilution vote were ever held. The sole evidence for such a remarkable finding is that Respondents had, at times, failed to timely perform contractual obligations to Petitioner, including payment of bills. This failure to pay bills is much more evident of financial difficulty than fraud. Failure to perform a contract, without more, is not evidence of fraud. Fanucchi & Limi Farms v. United Agri Products, 414 F.3d 1075, 1088 (9th Cir. 2005); Tenzer v. Superscope, Inc., 39 Cal.3d 18, 30, 216 Cal.Rptr. 130, 702 P.2d 212, 219 (Cal. 1985); Spoljaric v. Percival Tours, 708 S.W.2d 432, 434-5 (Tex. 1986).

Additionally, under both California and Texas law, the discovery rule tolls limitations until a party "either (1) actually discovered his injury or (2) could have discovered injury and cause through the

exercise of reasonable diligence." April Enterprises, Inc. v. KTTV, 147 Cal. App.3d 805, 826, 195 Cal. Rptr. 421, 427 (1983); H.B. Filmes, Ltd. v. CBS, Inc., 98 Fed. Appx. 596 (9th Cir. 2004); KPMG Peat Marwick v. Harrison County Housing Finance Corp., 988 S.W.2d 746, 748 (Tex. 1999). The Court below has never made any finding that Petitioner either actually knew of the fraud, or that Petitioner should have discovered its injury by May, 2001. The Court below simply held that prior breaches of contract bar a later occurring tort of fraud or breach of fiduciary duty, as a matter of law. A defendant moving to dismiss or for summary judgment on the issue of limitations has the burden to either negate the discovery rule or to prove when the plaintiff "could have discovered injury and cause through the exercise of reasonable diligence". Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440-41, 159 P.2d 958, 973-4 (Cal. 1945); KPMG, 988 S.W.2d at 748. The Respondents did not do so, and could not do so in a pre-answer motion to dismiss.

Whether the plaintiff exercised reasonable diligence in discovering the fraud or its injury is

almost always a question of fact for the court or jury to decide. Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir.1988) (the question of whether a plaintiff knew or should have known of fraud is a fact issue to be left to the jury; see also, Enfield v. Hunt (1979) 91 Cal. App. 3d 417, 419, 154 Cal. Rptr. 146; Hobart, 26 Cal.2d at 440-41; KPMG, 988 S.W.2d at 748. The record shows that the District Court erred when it made impermissible factual determinations on Saoud's pre-answer motion to dismiss. Garter-Bare Co. v. Munsingwear Inc., 723 F.2d 707, 711 (9th Cir. 1984), cert. denied, 469 U.S. 980, 105 S.Ct. 381, 83 L.Ed.2d 316 (1984) (where there are disputed questions of fact or facts susceptible to opposing inferences as to when the statute of limitations for fraud commenced, summary judgment is not appropriate).

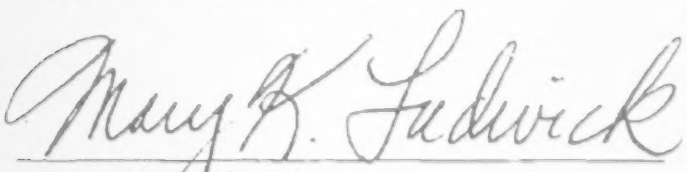
Petitioner believes that it is critically important to resolve the issue of whether a court may infer matters outside the 4 corners of the complaint in ruling upon a pre-answer motion to dismiss and whether a well pleaded allegation of a continuing conspiracy will defeat a pre-answer

motion to dismiss. Since limitations was the sole basis upon which the District Court granted Saoud's motion to dismiss, this Court should grant certiorari to resolve these issues.

CONCLUSION

For the reasons set forth herein, Petitioner requests that this Court Petition for Writ of Certiorari be granted.

Respectfully Submitted,



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DECLARATION OF MARY K. LUDWICK

I, Mary K. Ludwick, subject to the laws concerning perjury, hereby submit this Declaration pursuant to 28 U.S.C. §1746, and state as follows:

1. My name is Mary K. Ludwick. I am over the age of eighteen, of sound mind, and competent to make this declaration, and I have never been convicted of a felony or any other crime. I have personal knowledge of the matters contained herein and they are true and correct.

2. I am the lead attorney and an attorney of record in *Skidmore Energy, Inc. v. Mediholding, S.A., et al*, Case No. CV-05-04742-FMC (CWx) in the United States District Court for the Central District of California, and in *Skidmore Energy, Inc. v. Mediholding, S.A., et al*, Case No. 07-56790 in the United States Court of Appeals for the Ninth Circuit, and in the Petition for Writ of Certiorari filed with this Court. I am admitted to practice before the United States Supreme Court.

3. Each of the documents contained in this Appendix to Petition for Writ of Certiorari as Appendix Exhibits A through D is a true and correct copy of the original thereof.

4. I declare, under penalty of perjury according to the laws of the United States of America, that the foregoing is all true and correct.

Signed 8-16-10.

Mary K. Ludwick

Mary K. Ludwick

EXHIBIT A

9th Circuit Unpublished Memorandum Opinion Affirming in all Respects the Orders of the Trial Court App.1

APP. 1
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKIDMORE ENERGY, INC.,

Plaintiff-Appellant,

v.

MAGREB PETROLEUM EXPLORATION, S.A., et al,

Defendants-Appellees

No. 07-56790

D.C. No. CV-05-04742-FMC

MEMORANDUM*

Appeal from the United States District Court
for the Central Division of California
Florence Marie Cooper, District Judge Presiding

Argued and Submitted July 6, 2009**
Pasadena, California

Before FERNANDEZ and NR SMITH, Circuit Judges, and MILLS,*** District Judge

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decition without oral argument pursuant to Federal Rules of Appelleate Procedure 34(a)(2).

*** The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

In this case, the latest in a series of suits relating to a failed Moroccan venture, Skidmore Energy, Inc. appeals from the district court's orders dismissing all defendants.

The bulk of the defendants were dismissed for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Because California's long-arm statute is co-extensive with constitutional minimums, Cal. Civ. Proc. Code § 410.10, we ask only whether sufficient minimum contacts were established. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008).

Most of the events in this case related to and occurred in Morocco. Skidmore itself is a Texas corporation. The major tie to California is a single preliminary meeting that occurred there.

Despite the paucity of California contacts, Skidmore argues that jurisdiction existed because the defendants' out-of-state conduct had substantial effect somewhere in the United States. The intentional act, however, was not aimed at California. *See Calder v. Jones*, 465 U.S. 783, 788-89 (1984). The effects were also not felt in California.

Id. Indeed, if the conduct redounded anywhere in this country, it would have been in Texas. A district court there, however, found the effects were insufficient; to the extent Skidmore suggests this conclusion was erroneous, it is appealing to the wrong court.

Effects test aside, Skidmore also contends that personal jurisdiction may be based on the alleged commission of torts by several defendants during the California meeting. Restatement (Second) of Conflicts of Law § 36. But the torts alleged, whether analyzed under California or Texas law, require a showing§ of justifiable reliance. *Jackson v. Speer*, 974 F.2d 676, 679 (5th Cir. 1992); *Magpali v. Farmers Group, Inc.*, 48 Cal.App.4th 471, 484 (1996), and the Complaint demonstrates that any misrepresentations were repudiated prior to the alleged reliance. Since no in-state tort occurred, personal jurisdiction cannot rest on this ground. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 314 (5th Cir. 2007).

Skidmore argues that its remaining claim (against Defendant Saoud) was improperly dismissed

as untimely. Because the California statute of limitations is shorter, we give the benefit to Skidmore and assume that the Texas four-year statute of limitations applies. Tex. Civ. Prac. & Rem. Code § 16.004. Since this suit was filed in June 2005, the operative date is June 2001. But Saoud's alleged fraud (introducing Skidmore's owners to Defendants) occurred prior to 2001. Skidmore defends by arguing that its fraud claim did not accrue until it suffered its final injury, which allegedly occurred in July 2001. But we agree with the district court: the Complaint shows that Skidmore had suffered numerous prior injuries that, when taken together, would have alerted a reasonable person to investigate prior to June 2001.

Skidmore's remaining contentions are unpersuasive.

AFFIRMED.
FILED JULY 16, 2009

EXHIBIT B

District Court Orders Granting Respondents' Motions to Dismiss in the Trial Court:

11-9-05 Order Granting Defendants' [Abdu Saoud, Samaha Trading (UK) Ltd., and Shezi Nackvi] Motions to Dismiss App.5

10-11-06 Order Granting Defendant Mideast Fund for Morocco, Ltd.'s Motion to Dismiss App.29

11-25-07 Order Granting Defendants' [Mediholding, S.A., Benslimane, and Magreb Petroleum Exploration, S.A.] Motions to Dismiss App.50

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SKIDMORE ENERGY, INC.	§	CV 05-04742 FMC (CWx)
	§	
	§	
Plaintiff,	§	ORDER GRANTING
	§	DEFENDANTS'
vs.	§	MOTIONS TO DISMISS;
	§	
MEDIHOLDING, S.A., et al,	§	ORDER DENYING
	§	MOTION FOR SERVICE
	§	OF SUMMONS AND
Defendants.	§	COMPLAINT IN A
	§	FOREIGN COUNTRY

This matter is before the Court on Defendant Abdu Saoud's Motion to Dismiss (docket #13), Defendant Samaha Trading (UK) Ltd.'s Motion to Dismiss (docket #26), Defendant Shezi Nackvi's Motion to Dismiss (docket #27), and Plaintiff's Motion for Service of Summons and Complaint in a Foreign Country (docket #29). The Court has read and considered the moving, opposition, and reply documents submitted in connection with these Motions. The matter was heard on November 7, 2005, at which time the parties were in receipt of the Court's tentative Order. Upon consideration of the

parties' papers and oral argument, the Court grants Defendants' Motions to Dismiss, and denies Plaintiff's Motion for Service of Summons and Complaint.

I. Background

A. Nature of the Action

This action arises out of Plaintiff's foreign investments in the oil business.

B. Parties

Plaintiff filed the present action on July 20, 2005, against 1) Mediholding S.A. ("Mediholding"), Morocco company; 2) Mohammed Benslimane ("Benslimane"), an individual; 3) Mideast Fund for Morocco, Ltd. ("MFM"), a Liechtenstein company fka Armadillo Holdings Ltd. ("Armadillo"); 4) Sheza Nackvi ("Nackvi"), an individual; 5) Samaha Trading (UK) Ltd. ("Samaha"), a United Kingdom private limited company; 6) Abdu Saoud ("Saoud"), an individual; and 7) Maghreb Petroleum Exploration S.A. ("MPE"), a Morocco company fka Lone Star Energy Corporation ("Lone Star").

C. Factual Allegations

Beginning in 1984, Skidmore became interested in drilling for oil and gas in Morocco. In August 1998, Skidmore's president, Michael H. Gustin ("Gustin"), traveled to Morocco in furtherance of that interest. Around the same time, Gustin met with Defendant Saoud to discuss Skidmore's interests in Morocco. Saoud agreed to act as an agent for Skidmore in Morocco to "actively assist in the formation of an African public business entity whose primary focus would be to develop the energy resources on the continent of Africa, ... [specifically] in Morocco." FAC ¶ 22.

During the course of the negotiations, and with Saoud's assistance, Skidmore agreed to take on a local partner/shareholder, Defendant Mediholding, which would be responsible for handling "all local issues, including legal and accounting compliance." FAC ¶ 24. Skidmore agreed to transfer 8% of the Moroccan ventured to Mediholding. As a result of this agreement, a Moroccan-based company, Lone Star, was formed: 90% ownership to Skidmore, 8% to Mediholding, and 2% to Saoud.

In February 2000, Skidmore obtained rights to

over 14 million acres (on-shore and off-shore), "where no commercial quantities of hydrocarbons had ever been discovered." FAC ¶ 25. In March 2000, Mediholding and Skidmore entered into their first memorandum of understanding ("MOU") that transferred the rights to the over 14 million acres from Skidmore to Lone Star. In exchange, "Mediholding agreed to assist Lone Star in its orientation policy and in the negotiations with the Moroccan authorities so as to provide the best possible conditions for Lone Star," and Mediholding agreed to manage Lone Star's dealings with the public administrations and private Moroccan companies." FAC ¶ 26.

In May 2000, Skidmore and Lone Star struck oil (and gas). On July 8, 2000, representatives of Skidmore met with His Majesty King Mohammed VI of Morocco. Skidmore made certain promises regarding funding surveying analysis, business expenses, and the drilling of the first well in Talsinnt Field. The parties had an "agreed goal of keeping interests in Lone Star limited to Skidmore and Moroccan hands." FAC ¶ 28. After the meeting,

representatives of the King assured representatives of Skidmore that "the funding necessary to develop the Talsinnt Field and explore the off-shore Loukos Field (which would be known as the Lone Star Drilling Project) would be arranged through a Moroccan-owned entity." FAC ¶ 28.

Skidmore was informed that "'Armadillo' had been selected by Mediholding to be Lone Star's development and/or investment partner to provide the operating capital to complete Phase 1 of the Lone Star Drilling Project." FAC ¶ 29. Skidmore was led to believe that Armadillo was totally owned by Moroccans.

Skidmore, Mediholding, Armadillo, and Lone Star entered into a second memorandum of understanding dated August 23, 2000. In exchange for an infusion of capital in the amount of $27.5 million, Skidmore was to transfer one-half of its remaining shares in Lone Star to Armadillo. That left Skidmore with a 44% interest in Lone Star.

A third MOU was entered into in October 2000 by the same four parties addressing Skidmore's right

to eliminate Armadillo's involvement under certain circumstances, and specifying terms for repayment of the investments made by Skidmore in Lone Star.

Armadillo did not fulfill its promise to provide millions of dollars in operating capital. By February 2001, drilling operations in the Talsinnt and Loukos Fields had been shut down due to nonpayment by Armadillo of its share of the expenses.

In April 2001, the parties entered into yet another MOU, which required Skidmore to transfer one-half of its remaining interest (or a 22% interest) in Lone Star to Armadillo in exchange for Armadillo's promise to "undertake all of the financial requirements of Lone Star's accounts and its operating budget for 2001." FAC ¶ 35. Negotiations commenced and disputes quickly arose regarding what entity would pay Lone Star's past due bills.

In late April 2001, two individual Defendants, Benslimane and Nackvi, traveled to Los Angeles to meet with a representative of Plaintiff regarding payment of the past due bills:

> Subsequently, as a meeting in Los Angeles County,... between Mr. Dejoria

[representative of and one of two shareholders of Skidmore], Mr. Benslimane[,] and Mr. Nackvi, Armadillo's representative who claimed to represent Saudi Prince Bandar Bin Sultan and Saudi Sheik Saleh Abdullah Kamel, the owner of [Defendant] Samaha, Nackvi advised Mr. DeJoria that the King had received $13 million for the venture (which neither Mr. DeJoria nor Mr. Gustin knew anything about), but because it was costing more, they were taking it back and running it as a business. Mr. Nackvi agreed that he would arrange to have Lone Star's past due bills in the amount of approximately $16 million paid. The following day, Mr. Dejoria memorialized matters by letter to Mr. Nackvi.

However, after receiving the letter . . . Nackvi called . . . to indicate that he wanted to contribute millions of dollars instead, with additional terms,

> including the possibility that one side's interest would be diluted below 13 percent.

FAC ¶¶ 36-37.

On May 17, 2001, DeJoria received a letter from the financial director from Samaha, which cast doubt on Nackvi's assurance that Lone Star's past due bills would be paid. [1]

On May 23, 2001, Defendant Nackvi was appointed chairman of Lone Star. One of his first acts as chairman was to send a letter to all of Lone Star's creditors informing them that they would be paid 50% of all past due amounts, and the remaining amount would be paid over a three-year period. The April 2001 MOU was ratified, diluting Skidmore's share in Lone Star to 22%.

However, a June 30, 2001, meeting of Lone

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[1] "On May 17, 2001, ... Richard Menkin ... financial director of Samaha... stated that Mr. Dejoria's inference that Mr. Nackvi would be paying all past due bills for Lone Star was out of context and that no statement had been made to Lone Star's vendors that their bills would be taken care of right away." FAC ¶ 39.

Star shareholders resulted in the rescission of the April 2001 MOU. Skidmore's shareholders were not permitted to vote at the meeting; their power of attorney was not "accepted."

In July 2001, Lone Star issued more shares, and Skidmore's ownership interest was diluted to .27% of the total shares. After that transaction, Armadillo owned a 99.65% share, Skidmore owned a .27% share, Mediholding owned a .07% share, and several other individuals owned the remaining .01% share.

D. Claims

Skidmore asserts the following claims: 1) breach of contract (against Defendants Mediholding, Armadillo, and Lone Star); 2) fraud and conspiracy to defraud (against all Defendants); 3) breach of fiduciary duty/constructive fraud (against Mediholding and Armadillo; and 4) for declaratory relief against Lone Star, Mediholding, Armadillo, Benslimane and Nackvi (regarding the dilution of Skidmore's interest in Lone Star).

II. Saoud's Motion to Dismiss

Saoud moves to dismiss the sole claim asserted against him, arguing that the claim is barred by the statute of limitations. [2]

The Court agrees that the present action is barred by the statute of limitations. Plaintiff argues that the more generous four-year Texas statute of limitations — rather than the less generous three-year California statute of limitations — applies. Plaintiffs argument (and the factual record) is insufficiently developed for the Court to rule definitively on this issue. [3] However, even accepting

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[2] Because the Court grants Saoud's Motion on statute of limitations grounds, it does not address his arguments regarding collateral estoppel and Fed. R. Civ. P. 9(b) pleading requirements for fraud claims.

[3] In a diversity case, such as this one, federal courts must apply the choice-of-law rules of the forum state. *Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005). California courts apply a three-part governmental interest test. *Id.* First, a court must determine whether the foreign state law actually differs from the law of California. *Id.* If there is a conflict, then a court must consider whether each state has an interest in having its own law applied. *Id.* If each state has a legitimate interest, then the court compares the extent to which each state's

Plaintiff's argument that the Texas statute of limitations applies, the claim against Saoud is still time barred.

Under Texas law, causes of action for fraud must be brought within four years of the accrual of the claim. Tex. Civ. Prac. & Rem. Code Ann. § 16.004. When a claim accrues is sometimes determined by application of the "discovery rule", which in Texas states that a cause of action arises when a plaintiff discovers or should have discovered the nature of the injury. *Harrison v. American Protection Ins. Co.*, 158 S.W.3d 614, 627 (Tex. Ct. App. 2005); *Wingate v. Kerr-McGee Rocky Mountain Corp.*, 353 F. Supp.2d 779, 783 E.D. Tex. 2005). The Texas discovery rule "tolls the running of the statute of limitation until the victim is 'aware of facts as would cause the ordinarily intelligent and prudent man to investigate.'" Id. (quoting *Bush v. Stone*, 500 S.W.2d 885, 889 (Tex. Civ. App. 1973). Stated otherwise,

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interests will be impaired if the other state's law is applied. *Id*

> [t]he [Texas] discovery rule tolls the statute of limitations only until a plaintiff learns of a wrongful injury, or of facts that should lead to an investigation. Once a plaintiff has that knowledge, "the limitations clock is running even if the claimant does not yet know: the specific cause of the injury [,] the party responsible for it[,] the full extent of it[,] or the chances of avoiding it."

Wingate, 353 F.Supp.2d at 783 (quoting *PPG Industries v. JMB/Houston Centers Partners Ltd.*, 146 S.W.3d 79, 93-94 (Tex 2004)). Here, the course of events put Skidmore on notice of its injury more than four years before the filing of the present action.

Saoud's involvement in the factual allegations underlying this case began in 1998 and may have continued into 1999. Saoud is alleged to have introduced Plaintiff to individuals who, along with a number of business entities, were ultimately responsible for unfairly diluting Plaintiff's interest in

Lone Star. Plaintiff alleges that all Defendants were involved in a scheme to defraud Plaintiff.

As this alleged scheme proceeded, Defendants systematically diluted Plaintiff's interest in Lone Star through a series of promises made — but not kept — with respect to the operations of Lone Star and payment of its operating expenses. It was a long process, beginning in July 1999, when Plaintiff transferred 10% of its shares to bring in an entity "which would be responsible for handling all local issues," and ending in October 2001, when Plaintiff was notified that its ownership in Lone Star had been diluted to a .27% interest. Some time before October 2001, Plaintiff should have been aware of its injury.

Based on the Plaintiff's allegations, Plaintiff should have been aware of its injury at least as of May 2001. By then, Armadillo had allegedly reneged on its promise to provide operating capital. FAC ¶ 32 ("[I]n breach of the is various agreements, Armadillo was consistently late with the promised operating capital necessary to pay Lone Star's vendors, suppliers, and creditors, and ... Mediholding was not

ensuring that Lone Star was being operated in conformity with Moroccan laws, rules, and regulations.") The drilling operations had been shut down due to Armadillo's nonpayment of expenses. FAC ¶ 32. Plaintiff's share in Lone Star had been reduced to 22%. FAC ¶¶ 35, 40. This consistent downward spiral of operations and unfulfilled promises on the part of Plaintiffs partners in the Lone Star venture should have triggered Plaintiffs awareness of its injury. [4]

Accordingly, the cause of action accrued no later than May 2001, and the filing of the present action in June 2005 is outside the limitations period, even taking into account the more generous Texas limitations period.

Saoud's Motion to Dismiss is granted. The second cause of action is dismissed with prejudice as to Defendant Saoud.

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[4] Significantly, pursuant to the Texas discovery rule, a cause of action accrues when a plaintiff is on inquiry notice; the plaintiff need not have actual notice. A victim need only be "aware of facts that would cause the ordinarily intelligent and prudent man to investigate. *Wingate*, 353 F. Supp.2d at 783.

III. Nackvi's and Samaha's Motions to Dismiss

Both Nackvi and Samaha move to dismiss for lack of personal jurisdiction. [5]

A. Burden of Proof of Establishing Personal Jurisdiction

Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). In opposing a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a prima facie showing of jurisdictional facts. *Id.* Although the plaintiff cannot "simply rest on the bare allegations of its complaint," uncontroverted allegations in the complaint must be taken as true. *Id.* Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor. *Id.*

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[5] Because the Court grants the Motion on personal jurisdiction grounds, the Court does not consider the other arguments raised by Defendants.

B. General Personal Jurisdiction

Personal jurisdiction may be either general or specific. For general jurisdiction to exist over a nonresident defendant, the defendant must engage in continuous and systematic general business contacts that approximate a physical presence in the forum state. *Id.* at 801.

Nothing in the record — other than the bare allegations in the FAC [6] — suggests that the Court has general personal jurisdiction over either Nackvi or Samaha.

C. Specific Personal Jurisdiction

To determine whether it has specific personal jurisdiction over a nonresident defendant, the Court employs a three-part test: 1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or

[6] Plaintiff alleges that both Nackvi and Samaha have "regularly, continuously and systematically done business in the State of California." FAC ¶¶ 15-16.

resident thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; 2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and 3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Id.* at 802.

The plaintiff bears the burden of satisfying the first two prongs of the test. *Id.* If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable. *Id.*

The first prong is satisfied by either "purposeful availment" or "purposeful direction." *Id.* A purposeful availment analysis is most often used in suits sounding in contract, but a purposeful direction analysis is most often used in suits

sounding in tort. *Id.* Here, because the relevant claim against Nackvi and Samaha sounds in tort, the purposeful direction analysis is applicable.

The purposeful direction analysis is derived from a three-part "effects test" that is traceable to the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482 (1984). Pursuant to this analysis, the defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.*; *Schwarzenegger*, 374 F.3d at 803. All three parts of the test must be satisfied.

Here, it is alleged that Nackvi committed an intentional act by representing to Dejoria that Lone Star's past due bills would be paid. [7] Therefore, the first part of the effects test is satisfied.

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[7] It is less clear that Samaha is alleged to have committed an intentional act. For Samaha to be found to have committed an intentional act, Nackvi's actions would have to be imputed on Samaha. Nackvi's relationship with Samaha is not clear. Plaintiff alleges that Nackvi is Samaha's "representative," but it also alleges that Nackvi is the "representative" of the owner of Samaha. FAC ¶¶

The second part of the effects test is described by the Ninth Circuit as the "express aiming" requirement. *See Schwarzenegger*, 374 F.3d at 806. Here, it is clear that Nackvi's conduct was not expressly aimed at California. Here, Nackvi made assurances to a California resident that was allegedly meant to further the scheme to defraud a Texas corporation of its investment in a Moroccan corporation. Although the ultimate effects of the alleged fraudulent scheme may be felt indirectly in California through the decline in value of Mr. DeJoria's investment in Skidmore, this fact is not enough to satisfy the "express aiming" requirement. *See Bancroft &Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (foreseeability of effects in forum state do not confer jurisdiction); *Schwarzenegger*, 374 F.3d at 807 (incidental harm to California celebrity due to misappropriation of his likeness in advertisement aimed at Ohio residents was foreseeable, but insufficient to confer jurisdiction

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16, 36. For purposes of the present analysis, the Court assumes that Nackvi's acts are attributable to Samaha.

on California courts). Indeed, the requirement that harm in the forum state be likely or foreseeable relates to the third part of the effects test, and does not satisfy the second part. Because all the parts of the effects test must be satisfied, Skidmore has failed to establish that Nackvi or Samaha purposefully directed their actions at California.

At oral argument, Plaintiff's counsel pointed out, quite correctly, that the "effects test" is most often applied to cases in which out-of-state conduct results in harm within the forum state. In contrast, where, as here, the conduct occurs within the state, courts have a special interest in adjudicating it:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776, 104 S.Ct. 1473 (U.S. 1984) (internal quotation marks and citation omitted). Here, the allegedly tortuous activity occurred within the forum state.

Nevertheless, the Court is unpersuaded that Plaintiff's argument compels a different result from that reached by the Court. The difficulty here is that, unlike other cases involving torts committed within a state, the victim is not a California resident. Here, assuming the truth of Plaintiff's allegation — that Nackvi's statements were made in furtherance of an actionable civil conspiracy — the party who was wronged was not Skidmore's "representative" DeJoria; rather, it was Skidmore itself— a Texas corporation. The rationale underlying the exercise of jurisdiction for in-state tortious activity is that tortious activity within the state results in injury within the state, which ought to be deterred when possible and remedied when deterrence is not possible. *See id.* Because there is no California plaintiff here, the underlying rationale for the exercise of personal jurisdiction is not served. As set forth above in connection with the effects test

analysis, Nackvi's allegedly tortious activities were not purposefully directed toward California, and the Court lacks personal jurisdiction.

Because the Court lacks personal jurisdiction over Nackvi and Samaha, the Court grants the Motions to Dismiss of these two Defendants.

IV. Plaintiffs Motion for Service of Summons and Complaint

Skidmore requests that the Court order that four foreign Defendants, Benslitnane, Mediholding, MPE, and MFM, be served by delivery of the Summons and Complaint on their domestic attorneys, Crain, Caton & James, P.C. ("Crain,. Caton"), in Houston, Texas.

Crain, Caton has filed opposition to this Motion. Therein, the firm notes that it has not been authorized to accept service of process on behalf of the four Defendants. Bisk Affidavit. This alone justifies the denial of Skidmore's Motion.

The firm has also presented legal opinion letters that state that such service of process would not comply with the laws of Morocco or

Liechtenstein regarding service on a domestic defendant by an American plaintiff. *See* Crain, Canton's Response, Exs. B, C. The only acceptable method of service in these countries by an American plaintiff is through diplomatic channels by use of a letter rogatory. *Id.*; Fed. R. Civ. P. 4(f)(2)(B) (in the absence of an applicable internationally agreed-upon method of service, authorizing service on foreign defendants as directed by a foreign authority in response to a letter rogatory or letter of request).

Because Crain, Caton is not authorized to accept service on behalf of the four Defendants, and because the method of service proposed by Skidmore does not comply with the laws of Morocco or Liechtenstein, the Court denies Skidmore's Motion for Service of Summons and Complaint.

V. Conclusion

As set forth above, the Court grants Defendant Abdu Saoud's Motion to Dismiss (docket #13). The second cause of action is dismissed with prejudice as to Defendant Saoud.

The Court also grants Defendant Samaha Trading (UK) Ltd.'s Motion to Dismiss (docket #26) and grants Defendant Shezi Nackvi's Motion to Dismiss (docket #27). The Court has no personal jurisdiction over these Defendants; therefore, all claims against these two Defendants are dismissed without prejudice.

Finally, the Court denies Plaintiff's Motion for Service of Summons and Complaint in a Foreign Country (docket #29).

Dated: November 8, 2005

FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

FILED NOVEMBER 9, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SKIDMORE ENERGY, INC.	§	CV 05-04742 FMC (CWx)
Plaintiff	§	ORDER GRANTING
	§	DEFENDANT MIDEAST
vs.	§	FUND FOR MOROCCO,
	§	LTD.'S MOTION TO
MEDIHOLDING, S.A., a Morocco company; MOHAMMED BENSLIMANE, a Foreign national; MIDEAST FUND FOR MOROCCO, LTD, a LICHTENSTEIN Company, formerly known as Armadillo Holdings, Ltd.; SHEZI NACKVI, United Kingdom resident; SAMAHA TRADING (UK) LIMITED, a United Kingdom private limited company; ABDU SAOUD, a California Resident; and MAGHREB PETRO-LEUM EXPLORATION S.A.; a Morocco company, formerly known as Lone Star Energy Corporation,	§	DISMISS
Defendants	§	

This motion is before the Court on the Motion to Dismiss of Defendant Mideast Fund for Morocco, Ltd. ("MFM"), f/k/a Armadillo Holdings Ltd., filed on August 31, 2006 (docket no. 79). The Court has read and considered the moving, opposition, and reply documents submitted in connection with the motions. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for October 16, 2006 is removed from the Court's calendar. Upon consideration of the papers submitted, the Court GRANTS the motion.

FACTUAL BACKGROUND

Plaintiff, Skidmore Energy, Inc. ("Skidmore"), is a Texas corporation engaged in the business of oil and gas exploration. Skidmore maintains that Defendants, who are the foreign nationals and corporate entities, devised a "secret scheme" to deprive it of "millions of dollars in capital investments, in technological expertise in locating hydrocarbons, and the extremely valuable fruits of its labor in the discovery, drilling and development of

substantial oil and gas reserves in Morocco ..." The relevant facts, as alleged in the First Amended Complaint ("FAC") are as follows:

In August 1998, Skidmore's president, Michael H. Gustin ("Gustin"), traveled to Morocco to investigate the possibility of Skidmore's obtaining concessions to conduct some of its exploration activities in that country. (FAC ¶ 20-21.) Gustin entered into negotiations with ONAREP, Morocco's national oil company. (*Id.* at ¶ 22.) Saoud agreed to act as an agent for Skidmore in Morocco and to "actively assist in the formation of an African public business entity whose primary focus would be to develop the energy resources on the continent of Africa, ... [specifically] in Morocco." (*Id.*.)

During the course of the negotiations, and with Saoud's assistance, Skidmore agreed to take on a Moroccan partner/shareholder, Defendant Mediholding, S.A. ("Mediholding"), which would be responsible for handling "all local issues, including legal and accounting compliance." (*Id.* at ¶ 24.) Skidmore agreed to transfer eight percent of the Moroccan venture to Mediholding, in exchange for

future royalties. (*Id.*) As a result of this agreement, Skidmore formed and capitalized a Moroccan-based company, "Lone Star." Skidmore and its shareholders/principals, Gustin and Paul DeJoria ("DeJoria") were granted a ninety (90) percent ownership interest in Lone Star, while Mediholding and Saoud held the remaining interests of eight (8) and two (2) percent, respectively. (FAC ¶ 24.)

In February 2000, Skidmore obtained exploration rights to over fourteen million acres (on-shore and off-shore) of Moroccan territory, "where no commercial quantities of hydrocarbons had ever been discovered." *Id.* at ¶ 25. In March 2000, Mediholding and Skidmore entered into a memorandum of understanding ("MOU") that transferred the rights to over fourteen million acres from Skidmore to Lone Star. *Id.* at ¶ 26, Exhibit A. Mediholding's interest in Lone Star was also increased to twelve (12) percent. *Id.* In exchange, "Mediholding agreed to assist Lone Star in its orientation policy and in the negotiations with the Moroccan authorities so as to provide the best possible conditions for Lone Star." *Id.*

In May 2000, Skidmore and Lone Star struck oil (and gas) in a location known as the Talsinnt Field. *Id.* at ¶ 27. The then-estimated value of the find was $3 billion. *Id.* On July 8, 2000, representatives of Skidmore met with His Majesty King Mohammed VI of Morocco, along with two representatives of Mediholding—His Highness Moulay Abdellah ("Abdellah"), the King's first cousin, and Defendant Mohammed Benslimane ("Benslimane")—to discuss anticipated oil production and drilling operations at Talsinnt. *Id.* at ¶ 28. Skidmore made certain promises regarding funding surveying analysis, business expenses, and the drilling of the first well. *Id.* The parties had an "agreed goal of keeping interests in Lone Star limited to Skidmore and Moroccan hands." *Id.*

After the July 8, 2000 meeting, Abdellah and Benslimane informed Gustin that Mediholding had selected a company called "Armadillo" to be Lone Star's investment partner "to provide the operating capital to complete Phase I" of the drilling project. *Id.* at ¶ 29. Skidmore was led to believe that Armadillo was totally owned by Moroccans. *Id.*

On August 23, 2000, Skidmore, Mediholding, Armadillo, and Lone Star entered into a new MOU. *Id.* at ¶ 30, Exhibit B. The gravamen of the agreement was that, in exchange for an operating capital contribution of $27.5 million, Skidmore would transfer one-half of its remaining shares in Lone Star to Armadillo. *Id.* Skidmore was thus left with a forty-four (44) percent interest in Lone Star. *Id.*

In October 2000, Skidmore, Mediholding, Armadillo and Lone Star entered further MOU, whereby they agreed on particular terms for the repayment of the investments made by Skidmore in Lone Star, and confirmed the rights of Gustin and DeJoria to eliminate Armadillo's involvement under certain circumstances. *Id.* at ¶ 31, Exhibits C and D.

In breach of the various MOU, Armadillo did not make timely payments of operating capital necessary to pay Lone Star's vendors and creditors. *Id.* at ¶ 32. As a result, by February 1, 2001, Lone Star was forced to cease its drilling operations at Talsinnt. *Id.* Skidmore commenced efforts to obtain additional financing for the venture from third-party Moroccan and American investors, but was stymied

by the conspiracy acts of Abdellah, Benslimane, and others. *Id.* at ¶¶ 33-34.

On April 11, 2001, the same parties entered into yet another MOU, whereby Armadillo agreed "to undertake all of the financial requirements of Lone Star's accounts and its operating budget for 2001, in exchange for one-half of Skidmore's remaining ownership interest in Lone Star ..." *Id.* at ¶ 35. This action left Skidmore with a twenty-two (22) percent interest in Lone Star. *Id.*

On April 26, 2001, DeJoria met with Benslimane and a representative of Armadillo, Defendant Shezi Nackvi ("Nackvi"), in Los Angeles, California. *Id.* at ¶ 36. Nackvi also purported to represent the interests of Saudi Sheik Saleh Abdullah Kamel, the owner of Defendant Samaha Trading (UK) Limited ("Samaha"). *Id.* Nackvi advised DeJoria that he (Nackvi) "would arrange to have Lone Star's past due bills in the amount of approximately $16 million paid." *Id.* However, on May 17, 2000, DeJoria received a fax, at his Los Angeles office, from the financial director of Samaha, stating that any inference "that Mr. Nackvi would be

paying all the past due bills for Lone Star was out of context and that no statement had been made to Lone Star's vendors that their bills would be taken care of right away." *Id.* at ¶ 39.

On May 23, 2001, Nackvi was appointed chairman of Lone Star's board. *Id.* at ¶ 41. One of his first acts as chairman was to send a letter to all of Lone Star's creditors, informing them that they would be paid 50% of all past due amounts, and that the remaining amounts would be paid over a three-year period. *Id.*

The April 11, 2001 MOU was ratified by the board at the same time, officially diluting Skidmore's share of Lone Star to twenty-two percent. *Id.* at ¶ 40. However, at their June 30, 2001 general meeting, Lone Star's shareholders passed a resolution to cancel the April 2001 MOU. *Id.* at ¶ 42. Gustin and DeJoria were not permitted to vote at the meeting, as their power of attorney was not "accepted." *Id.*

In July 2001, Lone Star issued 3,617,386 new shares, such that Skidmore's ownership interest was dilued to .27 percent. *Id.* at ¶ 43. The remaining total shares were held by Armadillo (99.65%),

Mediholding (.07%), and several other individuals, including Nackvi and Benslimane (.01%). *Id.* at ¶ 44. Gustin and DeJoria were formerly notified of the share dilution on or about October 31, 2001. *Id.* Skidmore/Gustin/DeJoria also found out, at a time not specified, that Armadillo was actually owned by Saudis, not Moroccans. *Id.* at ¶ 54(e).

Lone Star's creditors continued to remain unpaid and its wells were capped, "thereby eliminating any opportunity for Skidmore to recoup its millions of dollars in investments or to partake in proceeds and royalties from the reserves that Skidmore and Lone Star discovered." *Id.* at ¶ 45.

PROCEDURAL HISTORY

Skidmore filed the present action on June 29, 2005 for (1) breach of contract, against Defendants Mediholding, Mideast Fund for Morocco, Ltd., f/k/a Armadillo ("MFM"), and Lone Star; (2) fraud and conspiracy to defraud, against all Defendants; (3) breach of fiduciary duty/constructive fraud, against Mediholding and MFM; and (4) declaratory relief, against Lone Star, Mediholding, MFM, Benslimane

and Nackvi. The FAC was filed on July 20, 2005.

On November 9, 2005, the Court issued a written order granting Defendants Saoud, Samaha and Nackvi's Motions to Dismiss. The Court subsequently denied Skidmore's motions for partial reconsideration and for entry of partial final judgment.

On May 3, 2006, the Court granted Skidmore's Motion for Issuance of Letters Rogatory to the appropriate officials in the Principality of Liechtenstein and the Kingdom of Morocco, for assistance in the service of the FAC on Defendants MFM, Mediholding, Benslimane, and Maghreb Petroleum Exploration S.A. On August 24, 2006, MFM was granted a brief extension of time to answer or otherwise respond to the FAC.

MFM now moves for dismissal of all of the causes of action against it, due to (1) lack of personal jurisdiction; (2) improper venue; (3) forum non conveniens; (4) tolling of the applicable statute of limitations; (5) failure to plead fraud with particularity; and (6) failure to state a claim on which relief can be granted. Because the Court

determines, *inter alia*, that it lacks personal jurisdiction, it does not address MFM's additional grounds for dismissal.

DISCUSSION

I. Burden of Proof of Establishing Personal Jurisdiction

"The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). California's long-arm statute extends to the limits of due process. *See id.*; Cal. Code Civ. Proc. § 410.10. Due process considerations require that non-resident defendants have certain "minimum contacts" with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International shoe, co. v. State of Washington Office of Unemployment*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

"Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that

jurisdiction is appropriate." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800)(9th Cir. 2004) (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). However, the plaintiff need only make a prima facie showing of jurisdictional facts. *Id.* Although the plaintiff cannot "simply rest on the bare allegations or its complain," uncontroverted allegations in the complaint must be taken as true. *Id.* Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor. *Id.*

II. General Personal Jurisdiction

Personal jurisdiction may be either general or specific. *Easter v. Am West Fin.*, 381 F.3d 948, 960 (9th Cir. 2004)("Under the due process analysis, a defendant may be subject to either general or specific personal jurisdiction.")(citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L.Ed. 2d 404, 104 S.Ct. 1868 n.98 (1984)). "If the defendant's activities in the form are substantial, continuous and systematic, general jurisdiction is available, in other words, the foreign defendant is

subject to suit even on matters unrelated to his or her contracts to the forum." *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001)(internal citations omitted). However, this is "an exacting standard," such that the defendant's contacts must be of the sort that approximate physical presence in the forum state. *Schwarzenegger*, 384 F.3d at 801.

Nothing in the record—other than bare allegations in the FAC—suggests that the Court has general personal jurisdiction over MFM. [8] It is undisputed that MFM is incorporated and has its only offices and bank accounts in the Principality of Liechtenstein. FAC at ¶ 6; Decl. of MFM ¶¶ 3-12. Indeed, Skidmore alleges only one physical meeting between a purported representative of MFM and Skidmore's shareholder in Los Angeles, California, followed by a single phone call and facsimile. (FAC ¶¶ 36-38. This activity is clearly insufficient to approximate "physical presence" in California by MFM. *Compare, e.g., Easter*, 381 F.3d at 960

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[8] Skidmore simply alleges that MFM f/k/a Armadillo has "continuously and systematically done business in the State of California with Skidmore's representative ...." FAC ¶¶ 14.

("Defendants submitted uncontroverted evidence that they have no offices, employees, or bank accounts in Washington, do not conduct business in Washington, and have not contracted with any Washington resident. Accordingly, the district court correctly found that the Trust Defendants are not subject to general personal jurisdiction in Washington.").

III. Specific Personal Jurisdiction

Specific personal jurisdiction applies if (1) the defendant performed some act or consummated some transaction within the forum state or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related actitivities, and (3) the exercise of jurisdiction is reasonable. *Id.* at 960-61.

The plaintiff bears the burden of satisfying the first two prongs of the test. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails to satisfy either of these prongs, specific personal jurisdiction is not established in the forum state. If the plaintiff

succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable. *Id.*

The first prong is satisfied by either "purposeful availment" or "purposeful direction." *Id.* A purposeful availment analysis is used in suits sounding in contract, while a purposeful direction analysis is appropriate for claims sounding in tort. *Id.; see also Yahoo! Inc. v. La Lique Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). In the instant case, the causes of action asserted against MFM sound in both tort and contract; thus, both analyses must be employed.

A. **Tort Claims (All Three Defendants)**

The purposeful direction analysis is derived from a three-part "effects test" traceable to the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 804 (1984). The defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.; see also*

Schwarzenegger, 374 F.3d at 805. All three parts of the test must be satisfied. *Schwarzenegger*, 374 F.3d at 805.

Here, it is alleged that MFM's representative, Defendant Nackvi, committed an intentional act by representing to DeJoria, in Los Angeles, that Lone Star's past due bills would be paid. Therefore, the first part of the effects test is satisfied. [9]

The second part of the effects test is described by the Ninth Circuit as the "express aiming" requirement. *See Schwarzenegger*, 374 F.3d at 806. As the Court found in its November 9, 2005 Order granting Defendant Nackvi's motion to dismiss, it is clear that Nackvi's conduct was not "expressly aimed" at California. *See* Order Granting Defendants' Motions to Dismiss, November 8, 2005, at 12-13. Specifically, the Court reasoned:

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[9] The parties dispute whether Nackvi was acting on behalf of MFM or another entity at the April 2001 meeting with DeJoria. However, for the reasons set forth herein, Nackvi's true affiliation is irrelevant, as his conduct is insufficient to constitute purposeful direction or purposeful availment by MFM, in any event.

> Nackvi [and Benslimane] made assurances to a California resident (DeJoria) that were allegedly meant to further the scheme to defraud a Texas corporation of its investment in a Moroccan corporation. Although the ultimate effects of the alleged fraudulent scheme may have been felt indirectly in California through the decline in value of Mr. DeJoria's investment in Skidmore, this fact was not enough to satisfy the 'express aiming' requirement. *See Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (foreseeability of effects in forum state does not confer jurisdiction); *Schwarzenegger*, 374 F.3d at 807 (incidental harm to California celebrity due to misappropriation of his likeness in advertisement aimed at Ohio residents was foreseeable, but insufficient to confer jurisdiction on California courts). Indeed, the requirement that harm in the forum state be likely and foreseeable relates to the third part of the effects test, and does not satisfy the second part.

Id.

Because all parts of the effects test must be satisfied, Skidmore has failed to establish that MFM "purposefully directed" its activities at California.

B. Contract Claims (Purposeful Availment)

"A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there." *Schwarzenegger*, 374 F.3d at 802; *see also Unocal*, 248 F.3d at 924 ("Purposeful availment, which satisfies the first part of the Ninth Circuit test, requires a finding that the defendant [has] performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state."). In its seminal decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed. 528 (1985), the Supreme Court noted that courts should take a "highly realistic" approach to minimum contacts analysis in contract cases, recognizing that "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." 471 U.S. at 479 (citations omitted). "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of

dealing—that must be evaluated in determining whether the defendant purposefully established the minimum contacts with the forum." *Id.*

Here, the record reflects that the various contracts (MOU) between Skidmore, Mediholding and MFM/Armadillo were entered into, negotiated and/or ratified in Morocco or Liechtenstein, that any payments due thereunder were to go to Lone Star (in Morocco) or Skidmore (in Texas), and that all disputes are to be governed by international law. More importantly, the *subject matter* and future consequences of the parties' agreements involved oil and gas operations *exclusively* in Morocco—i.e. the Talsinnt Field. Accordingly, MFM cannot be deemed to have purposely promoted the transaction of business in California. *Compare Unocal*, 248 F.3d at 924 (no "purposeful availment" where contract related to oil pipeline in Burma and otherwise "had nothing to do with California"); *with Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991)(finding purposeful availment where "most of the future of the contract would have centered on the forum").

The Court agrees with MFM that the April 26,

2001 meeting between Nackvi and DeJoria was merely "incidental" to the parties' overall contractual relationship. [10] *Cf. Roth*, 942 F.2d at 621 ("While we concede that negotiations did take place at that time [in Los Angeles], "temporary physical presence" in the forum does not suffice to confer personal jurisdiction."); *Sher*, 911 F.2d at 1363 ("[Defendants'] three trips to California were discrete events arising out of a case centered entirely in Florida; they appear to have been little more than a convenience to the client, who would otherwise have had to travel to Florida.") The fact a phone call and/or fax were subsequently made to/from DeJoria in Los Angeles is also insufficient to support purposeful availment. *Roth*, 942 F.2d at 622 ("[B]oth this court and the courts of California have concluded that ordinarily the use of the mails, telephone or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state.") (internal quotations omitted).

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[10] Indeed, the meeting between Nackvi and De Joria took place after Skidmore and MFM had negotiated and signed the final MOU.

CONCLUSION

Because Defendant MFM has not "purposely directed" its activities at California and/or "purposefully availed" itself of transacting business within the state, the Court lacks personal jurisdiction. Accordingly, MFM's Motion to Dismiss (docket no. 79), is GRANTED.

IT IS SO ORDERED.
October 11, 2006

/s/ Florence Marie Cooper
FLORENCE MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

ORDER FILED: 10-11-06

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SKIDMORE ENERGY, INC.	§	CV 05-04742 FMC (CWx)
Plaintiff	§	ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS
vs.	§	
MEDIHOLDING, S.A., a Morocco company; MOHAMMED BENSLIMANE, a Foreign national; MIDEAST FUND FOR MOROCCO, LTD, a LICHTENSTEIN Company, formerly known as Armadillo Holdings, Ltd.; SHEZI NACKVI, United Kingdom resident; SAMAHA TRADING (UK) LIMITED, a United Kingdom private limited company; ABDU SAOUD, a California Resident; and MAGHREB PETRO-LEUM EXPLORATION S.A.; a Morocco company, formerly known as Lone Star Energy Corporation,	§	
Defendants	§	

This matter is before the Court on Defendants Mediholding, S.A., Mohammed Benslimane, and Magheb Petroleum Exploration, S.A.'s Motions to Dismiss (docket nos. 102, 103, and 105), filed on June 19, 2007. The Court has read and considered the moving, opposition, and reply documents submitted in connection with the motions. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons and in the manner set forth below, the Court GRANTS the motions.

FACTUAL BACKGROUND

Plaintiff, Skidmore Energy, Inc. ("Skidmore"), is a Texas corporation engaged in the business of oil and gas exploration. Skidmore maintains that Defendants, who are the foreign nationals and corporate entities, devised a "secret scheme" to deprive it of "millions of dollars in capital investments, in technological expertise in locating hydrocarbons, and the extremely valuable fruits of its labor in the discovery, drilling and development of

substantial oil and gas reserves in Morocco ..." The relevant facts, as alleged in the First Amended Complaint ("FAC") are as follows:

In August 1998, Skidmore's president, Michael H. Gustin ("Gustin"), traveled to Morocco to investigate the possibility of Skidmore's obtaining concessions to conduct some of its exploration activities in that country. (FAC ¶ 20-21.) Gustin entered into negotiations with ONAREP, Morocco's national oil company. (*Id.* at ¶ 22.) Saoud agreed to act as an agent for Skidmore in Morocco and to "actively assist in the formation of an African public business entity whose primary focus would be to develop the energy resources on the continent of Africa, ... [specifically] in Morocco." (*Id.*.)

During the course of the negotiations, and with Saoud's assistance, Skidmore agreed to take on a Moroccan partner/shareholder, Defendant Mediholding, S.A. ("Mediholding"), which would be responsible for handling "all local issues, including legal and accounting compliance." (*Id.* at ¶ 24.) Skidmore agreed to transfer eight percent of the Moroccan venture to Mediholding, in exchange for

future royalties. (*Id.*) As a result of this agreement, Skidmore formed and capitalized a Moroccan-based company, "Lone Star." [11] Skidmore and its shareholders/principals, Gustin and Paul DeJoria ("DeJoria") were granted a ninety (90) percent ownership interest in Lone Star, while Mediholding and Saoud held the remaining interests of eight (8) and two (2) percent, respectively. (FAC ¶ 24.)

In February 2000, Skidmore obtained exploration rights to over fourteen million acres (on-shore and off-shore) of Moroccan territory, "where no commercial quantities of hydrocarbons had ever been discovered." (*Id.* at ¶ 25.) In March 2000, Mediholding and Skidmore entered into a memorandum of understanding that transferred the rights to over fourteen million acres from Skidmore to Lone Star. (*Id.* at ¶ 26, Ex. A.) Mediholding's interest in Lone Star was also increased to twelve (12) percent. (Id.) In exchange, "Mediholding agreed to assist Lone Star in its orientation policy and in the

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[11] At some unspecified prior time, Lone Star was renamed Maghreb Petroleum Exploration, S.A. ("MPE"). *Id.* at ¶ 10; Gustin Decl. ¶ 4.)

negotiations with the Moroccan authorities so as to provide the best possible conditions for Lone Star." (*Id.*)

In May 2000, Skidmore and Lone Star struck oil (and gas) in a location known as the Talsinnt Field. (*Id.* at ¶ 27.) The then-estimated value of the find was $3 billion. (*Id.*)

On July 8, 2000, representatives of Skidmore (Gustin and DeJoria) met with His Majesty King Mohammed VI of Morocco, along with two representatives of Mediholding—His Highness Moulay Abdellah ("Abdellah"), the King's first cousin, and Defendant Mohammed Benslimane ("Benslimane")—to discuss anticipated oil production and drilling operations at Talsinnt. (*Id.* at ¶ 28.) Skidmore made certain promises regarding funding surveying analysis, business expenses, and the drilling of the first well. (*Id.*) The parties had an "agreed goal of keeping interests in Lone Star limited to Skidmore and Moroccan hands." (*Id.*)

After the July 8, 2000 meeting, Abdellah and Benslimane informed Gustin that Mediholding had selected a company called "Armadillo" to be Lone

Star's investment partner "to provide the operating capital to complete Phase I" of the drilling project. (*Id.* at ¶ 29.) Skidmore was led to believe that Armadillo was totally owned by Moroccans. (*Id.*)

On August 23, 2000, Skidmore, Mediholding, Armadillo, and Lone Star entered into a new memorandum of understanding. (*Id.* at ¶ 30, Ex. B.) The gravamen of the agreement was that, in exchange for an operating capital contribution of $27.5 million, Skidmore would transfer one-half of its remaining shares in Lone Star to Armadillo. (*Id.*) Skidmore was thus left with a forty-four (44) percent interest in Lone Star. (*Id.*)

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In breach of the various memoranda of understanding, Armadillo did not make timely

payments of operating capital necessary to pay Lone Star's vendors and creditors. (*Id.* at ¶ 32.) As a result, by February 1, 2001, Lone Star was forced to cease its drilling operations at Talsinnt. (*Id.*) Skidmore commenced efforts to obtain additional financing for the venture from third-party Moroccan and American investors, but was stymied by the conspiracy acts of Abdellah, Benslimane, and others. (*Id.* at ¶¶ 33-34.)

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On April 26, 2001, DeJoria met with Benslimane and a representative of Armadillo, Defendant Shezi Nackvi ("Nackvi"), in Los Angeles, California. (*Id.* at ¶ 36.) Nackvi also purported to represent the interests of Saudi Sheik Saleh

Abdullah Kamel, the owner of Defendant Samaha Trading (UK) Limited ("Samaha"). (*Id.*) Nackvi advised DeJoria that he (Nackvi) "would arrange to have Lone Star's past due bills in the amount of approximately $16 million paid." (*Id.*) However, on May 17, 2000, DeJoria received a fax, at his Los Angeles office, from the financial director of Samaha, stating that any inference "that Mr. Nackvi would be paying all the past due bills for Lone Star was out of context and that no statement had been made to Lone Star's vendors that their bills would be taken care of right away." (*Id.* at ¶ 39.)

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The April 11, 2001 memorandum of understanding was ratified by the board at the same time, officially diluting Skidmore's share of Lone Star to twenty-two percent. (*Id.* at ¶ 40.) However,

at their June 30, 2001 general meeting, Lone Star's shareholders passed a resolution to cancel the memorandum. (*Id.* at ¶ 42.) Gustin and DeJoria were not permitted to vote at the meeting, as their power of attorney was not "accepted." (*Id.*)

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On November 9, 2005, the Court issued a written order granting Defendants Saoud, Samaha and Nackvi's Motions to Dismiss for lack of personal jurisdiction. On October 26, 2006, the Court dismissed the action as to MFM, also due to lack of personal jurisdiction.

The remaining Defendants, Mediholding, MPE, and Benslimane, contend that the Court's prior orders compel a finding that the Court lacks personal jurisdiction over them as well. They also assert other grounds for dismissal, including *forum non conveniens* and failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because the Court determines that

personal jurisdiction over Mediholding, MPE, and Benslimane is indeed lacking, it does not address these additional grounds.

DISCUSSION

I. Basic Principles and Burden of Proof

"The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). California's long-arm statute extends to the limits of due process. *See id.*; Cal. Code Civ. Proc. § 410.10. Due process considerations require that non-resident defendants have certain "minimum contacts" with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International shoe, co. v. State of Washington Office of Unemployment*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

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jurisdiction is appropriate." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800)(9th Cir. 2004) (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). However, the plaintiff need only make a prima facie showing of jurisdictional facts. *Id.* Although the plaintiff cannot "simply rest on the bare allegations or its complain," uncontroverted allegations in the complaint must be taken as true. *Id.* Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor. *Id.*

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Nothing in the record—other than bare allegations in the FAC—suggests that the Court has general personal jurisdiction over Mediholding, MPE or Benslimane. [12] It is undisputed that both Mediholding and MPE are incorporated in Morocco and have their offices in the city of Rabat. (*See* Mediholding and MPE Mots., Exs. E.) Mr. Benslimane is a foreign national who currently resides in Morocco; he has never resided in the United States. (Benslimane Mot., Ex. E.)

Indeed, Skidmore alleges only one physical meeting between Benslimane, as a representative of Mediholding and/or MPE, and Skidmore's

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[12] Skidmore simply alleges that each of these entities/individuals has "continuously and systematically done business in the State of California with Skidmore's representative ...." FAC ¶¶ 12-13, 18.)

shareholder (DeJoria) in Los Angeles, California, followed by a single phone call and facsimile. (FAC ¶¶ 34-38.) This activity is clearly insufficient to approximate "physical presence" in California by any of the Defendants. *Compare, e.g., Easter*, 381 F.3d at 960 ("Defendants submitted uncontroverted evidence that they have no offices, employees, or bank accounts in Washington, do not conduct business in Washington, and have not contracted with any Washington resident. Accordingly, the district court correctly found that the Trust Defendants are not subject to general personal jurisdiction in Washington.").

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Specific personal jurisdiction exists if (1) the defendant performed some act or consummated some transaction within the forum state or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related actitivities, and (3) the exercise of jurisdiction is reasonable. *Id.* at 960-61.

The plaintiff bears the burden of satisfying the first two prongs of the test. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails to satisfy either of these prongs, specific personal jurisdiction is not established in the forum state. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable. *Id.*

The first prong is satisfied by either "purposeful availment" or "purposeful direction." *Id.* A purposeful availment analysis is used in suits sounding in contract, while a purposeful direction analysis is appropriate for claims sounding in tort. *Id.*; *see also Yahoo! Inc. v. La Lique Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). In the instant case, the causes of action asserted against Mediholding and MPE sound in both tort and contract; the claims against Benslimane sound in tort only.

A. Tort Claims (All Three Defendants)

The purposeful direction analysis is derived from a three-part "effects test" traceable to the

Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 804 (1984). The defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.; see also Schwarzenegger*, 374 F.3d at 805. All three parts of the test must be satisfied. *Schwarzenegger*, 374 F.3d at 805.

Here, it is alleged that Mediholding, MPE and Armadillo's representatives, Nackvi and Benslimane, committed an intentional act by representing to DeJoria in Los Angeles, that Lone Star/MPE's past due bills would be paid. Therefore, the first part of the effects test is satisfied. (FAC ¶ 36, Decl. of Gustin ¶ 7.)

The second part of the effects test is described by the Ninth Circuit as the "express aiming" requirement. *See Schwarzenegger*, 374 F.3d at 806. As the Court found in its November 9, 2005 Order granting Defendant Nackvi's motion to dismiss, it is clear that neither Nackvi nor Benslimane's conduct was "expressly aimed" at California. (*See* Order

Granting Defendants' Motions to Dismiss, November 8, 2005, at 12-13.) Specifically, the Court reasoned:

> Nackvi [and Benslimane] made assurances to a California resident (DeJoria) that were allegedly meant to further the scheme to defraud a Texas corporation of its investment in a Moroccan corporation. Although the ultimate effects of the alleged fraudulent scheme may have been felt indirectly in California through the decline in value of Mr. DeJoria's investment in Skidmore, this fact was not enough to satisfy the 'express aiming' requirement. *See Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (foreseeability of effects in forum state does not confer jurisdiction); *Schwarzenegger*, 374 F.3d at 807 (incidental harm to California celebrity due to misappropriation of his likeness in advertisement aimed at Ohio residents was foreseeable, but insufficient to confer jurisdiction on California courts). Indeed, the requirement that harm in the forum state be likely and foreseeable relates to the third part of the effects test, and does not satisfy the second part.

Id.

Because all parts of the effects test must be satisfied, Skidmore has failed to establish that

Mediholding, MPE or Benslimane "purposefully directed" their activities at California.

B. Contract Claims (Mediholding and MPE)

"A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there." *Schwarzenegger*, 374 F.3d at 802; *see also Unocal*, 248 F.3d at 924 ("Purposeful availment, which satisfies the first part of the Ninth Circuit test, requires a finding that the defendant [has] performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state."). In its seminal decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed. 528 (1985), the Supreme Court noted that courts should take a "highly realistic" approach to minimum contacts analysis in contract cases, recognizing that "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." 471 U.S. at 479 (citations

omitted). "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established the minimum contacts with the forum." *Id.*

Here, the record reflects that the various contracts (memoranda of understanding) between Skidmore, Mediholding and MPE were entered into, negotiated and/or ratified in Morocco or Liechtenstein, that any payments due thereunder were to go to Lone Star/MPE (in Morocco) or Skidmore (in Texas), and that all disputes are to be governed by international law. More importantly, the *subject matter* and future consequences of the parties' agreements involved oil and gas operations *exclusively* in Morocco—i.e. the Talsinnt Field. Accordingly, Mediholding and MPE cannot be deemed to have purposely promoted the transaction of business in California. *Compare Unocal*, 248 F.3d at 924 (no "purposeful availment" where contract related to oil pipeline in Burma and otherwise "had nothing to do with California"); *with Roth v. Garcia*

Marquez, 942 F.2d 617, 622 (9th Cir. 1991)(finding purposeful availment where "most of the future of the contract would have centered on the forum"). The Court agrees with Mediholding and MPE that the April 26, 2001 meeting between Nackvi, Benslimane and DeJoria was merely "incidental" to the parties' overall contractual relationship. [13] *Cf. Roth*, 942 F.2d at 621 ("While we concede that negotiations did take place at that time [in Los Angeles], "temporary physical presence" in the forum does not suffice to confer personal jurisdiction."); *Sher*, 911 F.2d at 1363 ("[Defendants'] three trips to California were discrete events arising out of a case centered entirely in Florida; they appear to have been little more than a convenience to the client, who would otherwise have had to travel to Florida.") The fact a phone call and/or fax were subsequently made to/from DeJoria in Los Angeles is also insufficient to support purposeful availment. *Roth*, 942 F.2d at 622 ("[B]oth this court and the courts of California have

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[13] Indeed, the meeting between Benslimane, Nackvi, and De Joria took place after Skidmore had negotiated and signed the final memorandum of understanding with MFM and Mediholding.

concluded that ordinarily the use of the mails, telephone or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state.") (internal quotations omitted).

CONCLUSION

Because Defendants Mediholding, Benslimane and MPE have not "purposely directed" their activities at California and/or "purposefully availed" themselves of transacting business within the state, the Court lacks personal jurisdiction. Accordingly, their Motions to Dismiss (docket nos. 102, 103, and 105), are GRANTED.

IT IS SO ORDERED.
October 24, 2007

/s/ Florence Marie Cooper
FLORENCE MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

ORDER FILED: 10-24-07
ORDER ENTERED: 10-25-07

EXHIBIT C

9th Circuit Order Denying Petitioner's (Appellant in the court below) Petitions for Rehearing and Rehearing En Banc App.71

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKIDMORE ENERGY, INC.,

Plaintiff-Appellant,

v.

MAGREB PETROLEUM EXPLORATION, S.A., et al,

Defendants-Appellees

No. 07-56790

D.C. No. CV-05-04742-FMC
Central District of California
Los Angeles

ORDER

Before FERNANDEZ and NR SMITH, Circuit Judges, and MILLS,* District Judge

This panel has voted to deny the petition for panel rehearing. Judge Fernandez and Smith have voted to deny the petition for rehearing en banc and Judge Mills so recommends.

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* The Honorable Richard Mills, Senior United States District Judg for the Central District of Illinois, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED SEPTEMBER 23, 2009

EXHIBIT D

Letter Sent by Non-Party Dallah al Baraka Group (a stranger to the transaction made the basis of this case), that it Would Not Be Paying the Drilling Expenses (the Sole Basis for the Affirmation by the Court of Appeals of Saoud's Dismissal on limitations)
....App.73

APP. 73

SAMAHA TRADING (UK) LIMITED
(UK REPRESENTATIVE OF SAMAHA HOLDINGS LIMITED)
Connaught House
1-3 Mount Street, London W1-K 3NA
[unreadable phone and fax numbers]

FAX MESSAGE

TO: John Paul Mitchell Systems
DATE: 17 May 2001
ATTENTION: John Paul DeJoria
REF: rm/gm/jpd 1705
FAX NO: 00 1 310 248 2780
NO. OF PAGES: 1
CC: Mr. Robert Shapiro
FROM: Richard Menkin
SUBJECT: Lonestar Energy

WITHOUT PREJUDICE

Dear Mr DeJoria

We refer you to your letter addressed to Shezi Nackvi dated 16 May 2001.

We particularly refer to the third paragraph of the above referenced letter wherein you infer that Mr Nackvi has stated that he (through the Dallas Al Baraka Group) "would be paying all past due bills for Lonestar Energy".

This inference is entirely out of context and is solely your own interpretation of the M.O.U. and the meeting at your home without benefit of all the facts. You have also mistakenly or incorrectly referred to a letter to Lonestar's vendors that "this will be taken care of right away". No such statement has been made.

Any further correspondence, comments or discussions on this subject should be addressed at the upcoming meeting in Morocco on 22 May.

As we do not have the fax address of your lawyer, Mr Robert Shapiro, we request you forward a copy of this fax to him for his files.

Yours sincerely

/s/ Richard Menkin

Richard Menkin
Finance Director

[UNREADABLE INFORMATION AT FOOT OF PAGE]